

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

DROPLETS, INC.,

Plaintiff,

vs.

**OVERSTOCK.COM, INC.,
SEARS ROEBUCK & CO.,
SEARS BRANDS LLC,
SEARS HOLDINGS CORPORATION,**

Defendants.

Civil Action No. 2:11-cv-401

JURY TRIAL

**PLAINTIFF DROPLETS INC.'S NOTICE OF SUPPLEMENTAL AUTHORITY IN
SUPPORT OF DROPLETS' MOTION TO STRIKE AND EXCLUDE EXPERT REPORT
AND TESTIMONY OF STEPHEN GRAY [DKT. 257]**

Plaintiff Droplets, Inc. ("Droplets") hereby submits this Notice of Supplemental Authority in support of its Motion to Strike and Exclude Expert Report and Testimony of Stephen Gray. Dkt. 257 ("Motion").

Attached hereto as Exhibit 1 is a copy of the opinion from the United States District Court for the Eastern District of Michigan in *Numatics, Inc. v. Balluff, Inc.*, Dkt. 146, Case No. 2:13-cv-11049 (E.D. Mich. Dec. 16, 2014). This is new, relevant, and persuasive authority on the issues set forth in Droplets' Motion, including striking and excluding an expert where the party's lawyers, and not the expert, drafted significant portions of the expert's report.

In *Numatics*, the court struck the defendants' expert's report and precluded the expert from testifying. *Id.* at *4-12. In doing so, the court noted

The problems with Justice's[, the defendants' expert,] testimony stem from the fact that he did not draft his own report; defense counsel drafted it for him. The Court finds that practice to be a remarkable breach of ethics and protocol, which defense counsel brazenly attempted to justify at oral argument. Expert witnesses

generally do not provide factual accounts of the contested issues, and their testimony need not be based on personal knowledge. *See* Fed. R. Evid. 602. Instead, they are permitted to comment on the evidence that others supply. Fed. R. Evid. 703. Expert witnesses are allowed to testify based on information furnished by others because they have technical expertise in a given field that “will help the trier of fact to understand the evidence.” Fed. R. Evid. 702(a). An expert witness who is merely a party’s lawyer’s avatar contributes nothing useful to the decisional process.

Id. at *4. The court continued by stating that “Justice’s report simply mimics the summary of the prior art found in Balluff’s invalidity contentions, provides no basis for concluding that prior art references would be combined, assumes that the prior art should be combined, and reaches a conclusion without knowing the relevant factors.” *Id.* at *5. The court further noted—in the context of whether the expert’s conclusions were his own or defendants’ lawyers’—that

Section H of the report illustrates the point. That section is nearly indistinguishable from Balluff’s third supplemental invalidity contentions, which were disclosed on May 7, 2014, several months before Justice apparently signed the report. The pictures, charts, and diagrams are the same. The citations are identical. The prose is indistinguishable down to the punctuation, leading to only one possible conclusion: the report was ghost-written by Balluff’s attorneys as a legal brief disguised (thinly) as an expert disclosure.

Id. at *10-11.

Dated: December 22, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic services on December 22, 2014. Local Rule CV-5(a)(3)(A).

/s/ James Quigley
James Quigley